Supreme Court, U.S.
FILED

No. 09-403

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In The
Supreme Court of the United States

DARRYL JONES; MICHAEL JONES;
ANTHONY PASLEY; STEPHEN W. GIBSON,
Petitioners,

v.

CITY OF FRANKLIN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should pro se claimants be required to use the words "hostile environment" in their EEOC charge and intake forms to meet the "notice" requirement? No.

2. Should pro se claimants be required to list every instance of racial hostilities in their EEOC charge and intake forms to meet the "notice" requirement? No.

3. Did the Trial Court and Appellate Court's holdings contradict prior holdings in the 6th Circuit regarding the standard of construction to be applied to a claimant's EEOC charge and intake forms? Yes.

4. Did the Trial Court and Appellate Court's holdings negate the "reasonably expected to grow out of" standard applied to EEOC charges, intake forms and investigations? Yes.

5. Did the Trial Court and Appellate Court's holdings regarding the standard of construction to applied put it in direct conflict with its sister circuits, *to wit*: *Tolliver v. Xerox Corp.*, 918 F.2d. 1052 (2nd Cir. 1990); *Manning v. Chevron Chemical Company*, 332 F.3d 874 (5th Cir. 2003); *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002); *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191 (10th Cir. 2004); and, 29 CFR § 1601.12(b)? Yes.

6. Did the Trial Court and Appellate Court's failure to apply the "piggy backing" rule put it in direct conflict with its sister circuits, to wit: *Foster v.*

Ruhrpumpen, Inc., 365 F.3d 1191 (10th Cir. 2004); *Allen v. United States Steel Corp.* 665 F.2d 689 (5th Cir. 1982); *Horton v. Jackson County Board of Commissioners*, 343 F.3d 897 (7th Cir. 2003)? Yes.

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OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, dated February 5, 2009, is not officially reported but is reproduced in Appendix A, infra, at pp. 1a-14a. The opinion of the District Court for the Middle District of Tennessee, dated January 23, 2008, is not officially reported but is reproduced in Appendix B, infra, at pp. 15a-55a.

BASIS OF JURISDICTION

Petitioners brought their original claims pursuant to the Civil Rights Act of 1991 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The District Court for the Middle District of Tennessee granted summary judgment dismissing Petitioners' claims on January 23, 2008. The judgment of the Sixth Circuit Court of Appeals was entered on February 5, 2009. A timely petition for rehearing was denied on June 1, 2009. Appendix C, infra, pp. 56a-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the denial of the petition for rehearing.

STATEMENT OF THE CASE

Petitioners herein filed their claims asserting they had been discriminated against due to their race in the promotion process as well as being subjected to a racially hostile environment on August 21, 2006. (R.1, Complaint as to D. Jones, Docket No. 3:06-cv-0807; R.1, Complaint as to M. Jones, Docket No. 3:06-cv-0808; R.1, Complaint as to A. Pasley, Docket No. 3:06-

cv-0809; R.1, Complaint as to S. Gibson, Docket No. 3:06-cv-0810, Apx 16-46) Defendant filed its answers denying the same as to all Petitioners on September 11, 2006. (R. 5, Answer as to D. Jones, Docket No. 3:06-cv-0807; R. 5, Answer as to M. Jones, Docket No. 3:06-cv-0808; R. 5,Answer as to A. Pasley, Docket No. 3:06-cv-0809; R. 6, Answer as to S. Gibson, Docket No. 3:06-cv-0810, Apx. 47-65) Based upon a common nucleus of facts and law, the trial court entered an order consolidating all four cases; to wit, *Darryl Jones v. City of Franklin, Michael Jones v. City of Franklin, Anthony Pasley v. City of Franklin,* and *Stephen Gibson v. City of Franklin*, on October 18, 2006. (R.11, Apx. 67) On October 1, 2007, Defendant filed Motions for Summary Judgment in all four cases. (R. 24-58, Apx. 75-315) Petitioners filed their responses in opposition on November 21, 2007. (R. 63-83, Apx. 321-709) Defendant replied to all four summary judgment responses on December 6, 2007. (R. 84-85, Apx. 950-1091) Petitioners then filed a motion, which was granted, to file an omnibus supplemental response to Defendant's Motion for Summary Judgment. (R. 94-103, 1123-1257) On January 23, 2008, the Trial Court entered a Memorandum and Order granting summary judgment opining that Petitioners had failed to give enough notice to the EEOC of their claims of a racially hostile environment nor did they raise sufficient notice to the EEOC of discreet acts of discrimination such as their denials of promotions, job changes, and lowered performance evaluations due to their race. (R. 136-137, Apx. 1421) Petitioners filed their Notice of Appeal on January 24, 2008. (R.138, Apx. 1452) An appeal was taken and on February 5, 2009, this Court entered an opinion holding that the Petitioners had not exhausted their administrative as it pertained to their racially hostile environment claims. (See attached opinion)

STATEMENT OF THE FACTS

In summary, the Petitioners herein are four of six African-American firefighters with the city of Franklin, Tennessee, that filed EEOC charges alleging discrimination in employment decisions of the city as well as the use of racial slurs by city officials and decision makers.

D. Jones reported to the EEOC his complaints of discrimination in the promotion process, evaluations and racial remarks. (R. 63 Apx. 323, 754-756, 768-769, Response in Opposition to Motion for Summary Judgment as to Petitioner Darryl Jones 3:06-cv-0807)

M. Jones reported to the EEOC his complaints of racial slurs and discrimination in the promotion process.(R. 65 Apx. 418, 881-890, Response in Opposition to Motion for Summary Judgment as to Petitioner Michael Jones 3:06-cv-0808)

Gibson reported to the EEOC and city officials his complaints of racial slurs and discrimination in the promotion process. (R. 64 Apx. 809, 818-819, Response in Opposition to Motion for Summary Judgment as to Petitioner Stephen Gibson 3:06-cv-0810)

Gibson either experienced or was told about the racial hostilities by co workers.(R. 64 Apx. 809, 818-819) Response in Opposition to Motion for Summary Judgment as to Petitioner Stephen Gibson 3:06-cv-0810)

ARGUMENT

I. The Trial Court and Appellate Court applied a strict standard of construction to Petitioners' EEOC charges and not the liberal construction standard when determining "notice"

A. The Trial Court and Court of Appeals failed to properly apply the construction standard for laymen filing EEOC charges

B. The Trial Court and Court of Appeals failed to properly apply the "reasonably expected to grow out of" standard for laymen filing EEOC charges

C. The Trial Court and Court of Appeals required the Petitioners use the words "hostile environment" and list every instance of racial hostilities to put the employer and EEOC on notice of the nature of their claims

Respectfully the Trial Court and Appellate Court held that Petitioners reports of racial comments and slurs by city officials dealing directly with the fire department could only be used in the context of discrete acts of promotions because they did not use the words "hostile environment" in their EEOC charges. In its opinion the Appellate Court found "We have little doubt that, but for the administrative-exhaustion requirement, the plaintiffs in this case presented sufficient evidence of hostile, racist behavior in their work environment to survive a motion for summary judgment on this claim." (See opinion p. 7)

The Court then went on to cite to a companion case, *Baltimore v. City of Franklin,* to confirm this finding, a case brought by Petitioners' fellow firefighters based upon the same hostile environment wherein Respondent raised this same defense. In essence the Appellate Court held Petitioners had brought sufficient evidence of a racially hostile environment. The Court, however, held that because the report of racial slurs was encompassed in a charge about discreet employment actions and disparate treatment against "blacks" as a class, an investigation of a hostile work environment would not reasonably be expected to grow out of the EEOC's investigation. The Courts deviated from established precedent and applied a strict construction standard.

Given the administrative purpose of EEOC charges is to simply put the Defendant on notice of the nature of Petitioners' claims, they made sufficient allegations to give the Trial Court jurisdiction to hear them. As for hostile environment acts subsequent to administrative filings, they may be reviewed "so long as they could 'reasonably [be] expected to grow out of the [existing] EEOC charge. *Delisle v. Brimfield Township Police Department*, 94 Fed. Appx 247 (6th Cir. Ohio); *citing, Weigel v. Baptist Hosp.*, 302 F.3d 367 (6th Cir. 2002) As for original claims, there is no specificity requirement, in fact this Circuit holds inapposite of such a bright line test. The Court in *Seay v. Tennessee Valley Authority,* 2004 WL 2345626 (E.D.Tenn. 2004) held:

> Courts, including the Sixth Circuit, have expanded the requirement for filing an EEOC charge to include claims limited to the scope of the EEOC investigation reasonably expected to grow out of the discrimination charge. *Delisle v.*

Brimfield Township Police Department, 94 Fed.Appx. 247, 253-54, 2004 WL 445181, *6 (6th Cir.2004); *Weigel v. Baptist Hospital of East Tennessee*, 302 F.3d 367, 379-81 (6th Cir.2002); *Cleveland Branch, N.A.A.C.P. v. City of Parma, OH*, 263 F.3d 513, 534-36 (6th Cir.2001); *Strouss v. Michigan Department of Corrections*, 250 F.3d 336, 342 (6th Cir.2001); *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 832-33 (6th Cir.1999); *Davis v. Sodexho, Cumberland College Cafeteria*, 157 F.3d 460, 463-64 (6th Cir.1998); *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 254 (6th Cir.1998); *Ang*, 932 F.2d at 546-47; *Pearison v. Pinkerton's, Inc.*, 2002 WL 32060142, *4-5 (E.D.Tenn.2002). This is commonly referred to as the "expected scope of investigation test." *Weigel*, 302 F.3d at 380; *Johnston v. O'Neill*, 272 F.Supp.2d 696, 703-04 (N.D.Ohio 2003).

One reason for this relaxed test is that employment discrimination charges are frequently filed with the EEOC by lay persons who have little or no training and experience in the law. In determining whether Seay raised his charges at the administrative level so as to permit the exercise of subject matter jurisdiction in federal court, we are guided by the principle that discrimination charges filed with the EEOC by a non-lawyer complainant should not be narrowly restricted by his failure to attach the correct legal conclusion to an EEOC charge, conform to procedural technicalities, or include the exact wording that might be required in a judicial pleading. *Jones v. Sumser Retirement Village*, 209 F.3d 851, 853

(6th Cir.2000); *Duggins*, 195 F.3d at 833; *Davis*, 157 F.3d at 463; *Haithcock*, 958 F.2d at 675; *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1235 (6th Cir.1980); *EEOC v. The Bailey Co., Inc.*, 563 F.2d 439, 447 (6th Cir.1977); *Johnston*, 272 F.Supp.2d at 705; *see also Ang*, 932 F.2d at 546. An administrative charge filed with the EEOC that has been prepared by a non-lawyer without assistance from or representation by an attorney should be liberally and broadly construed to encompass all claims reasonably expected to grow out of the EEOC investigation of the charge made. *Sherman v. Chrysler Corp.*, 47 Fed.Appx. 716, 720, 2002 WL 31074591, *3 (6th Cir.2002); *Haithcock*, 958 F.2d at 677; *Cameron v. Bd. of Education of Hillsboro, Ohio School Dist.*, 795 F.Supp. 228, 234 (S.D.Ohio 1991).

The Court bears in mind that Title VII is a remedial statute. *Duggins*, 195 F.3d at 832; *Ang*, 932 F.2d at 546; *Johnston*, 272 *F.Supp.2d at 705. A non-lawyer complainant who files a pro se* discrimination charge with the EEOC seeking to initiate an investigation and administrative review process should not be harshly penalized for failing to draft the EEOC charge with the same degree of precision, detail, and legal quality as a pleading prepared by an attorney to be filed in court. Where facts related to the EEOC charge would reasonably prompt the EEOC to investigate a different uncharged claim, the plaintiff is not precluded from bringing suit in federal district court on that claim. *Weigel*, 302 F.3d at 380; *Young v. DaimlerChrysler Corp.*, 52 Fed.Appx. 637, 639-

40, 2002 WL 31681917, *2-3 (6th Cir.2002); *Duggins*, 195 F.3d at 832; *Davis*, 157 F.3d at 463; *Haithcock*, 958 F.2d at 675-77; *Doan v. NSK Corp.*, 266 F.Supp.2d 629, 635- 36 (E.D.Mich.2003).

Petitioners testified that they reported to the EEOC the use of racial slurs and discrimination in the promotion process of the City. "The test...is satisfied if there is a reasonable relationship between the allegations in the charge and the claims in the complaint, and the claim in the complaint can reasonably be expected to grow out of an EEOC investigation of the allegations in the charge. *Schwartz v. Bay Industries,* 274 F.Supp. 1041, 1045-1046 (E.D. Wisc. 2003); citing *Cheek v. W.& So. Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994).

Petitioners aren't required to use the words "hostile environment" or even allege that a hostile environment exists in their EEOC charges to file a Title VII claim in court. *Shorter v. Memphis Light, Gas, & Water Company,* 252 F.Supp. 2d 611 (W.D. Tenn 2003). In *Shorter,* the Court was faced with an African American male who had brought a Title VII lawsuit against *Memphis Light, Gas & Water* alleging race discrimination, retaliation and sufficient facts of a hostile environment. *Id.* at 616. Defendant in that case filed for summary judgment alleging that *Shorter* had not included claims for a racially hostile environment in either of his two EEOC charges. *Id.* at 624. In fact his first EEOC charge stated as follows:

> I have been demoted and subjected to discipline since March 2000. I have filed grievance [sic] in those regards. In retaliation for filing those

> grievances, I have been issued unsatisfactory performance evaluations. During the period in which I was discriminated against, I was the only Black employee in my job classification. I believe that I have been discriminated against because of my race, Black [,] and retaliated [against] for complaining about race discrimination in grievances in violation of Title VII.

Id. at 625. In his second EEOC charge, *Shorter* only asserted a claim for retaliation for filing the first EEOC charge. *Id.*

There was no doubt in the mind of the trial court that *Shorter* did not explicitly assert in either EEOC charge that he was subject to a hostile work environment. In denying summary judgment on this issue the Court held:

> The Court finds, however, that the cause of action stated in the complaint falls within the scope of the EEOC investigation that was reasonably expected to grow out of the charge of discrimination from the initial EEOC charge. Plaintiff asserted he was demoted and subjected to discipline as a result of race discrimination. An investigation of these allegations would have led the EEOC to examine whether a hostile work environment existed.

Id. at 625

This only makes sense given the numerous holdings in employment discrimination cases that a decision maker's racial slurs and animosity can be

used to infer discrimination in the decision making process. An employer's discriminatory statements may form the basis for an inference of discrimination and establish pretext.

This is inapposite of this Court's holding on page nine that "No decision in this circuit has held that EEOC charges regarding discrete acts of discrimination are alone sufficient to put the EEOC on notice of a hostile-work-environment claim." The Court went on to say "we agree with the district court's conclusion that the Petitioners did not alert the EEOC to the offensive incidents they now report." (See opinion page 10) This required the Petitioners to list every specific incident of racial hostilities to meet the test and bring a claim. Had the EEOC interviewed the witnesses found in Darryl Jones intake documents they would have discovered more detail of the racially hostile environment.

In *Ash v. Tyson,* 546 U.S. 454, 126 S.Ct. 1195 (2006), the Court held that a manager's use of the word "boy" when referring to African Americans was evidence of discriminatory animus in the selection process. *Id.* at 1197. In *Ross v. Campbell Soup, Co.*, 237 F.3d 701 (6th Cir. 2001), the Court held that statements made were sufficient to establish a genuine issue of pretext in a "regarded as" disability case. These are words which can be used to create a hostile enviroNment.

More importantly is the fact that Petitioners reported to the EEOC their complaints of racial slurs and discrimination in the promotion process. A charging party's reports to the EEOC of a hostile environment or discrimination in the promotion

process that the EEOC ultimately does not place in the charge are actionable. *Russell v. Bronson Heating and Cooling,* 345 F.Supp.2d 761(E.D. Mich. 2004). Therein, *Bronson Heating and Cooling* argued that *Russell* was precluded from pursuing a Title VII lawsuit for sexual harassment because her EEOC charge did not allege any specific instances of such. *Id.* In rejecting *Bronson's* argument, the Court held:

> The Court looks to the principle that the EEOC Charge should be "liberally construed to encompass all charges reasonably expected to grow out of the charge of discrimination." *Haithcock v. Frank,* 958 F.2d 671 (6th Cir. 1992). It is important to note that such charges are filed by lay complainants, and should not result in the restriction of subsequent complaints based on procedural technicalities or the failure to properly word the charge. *Id.* at 675. Plaintiff did recite incidents of sex harassment and sex and pregnancy discrimination prior to August 2002 in her Intake Questionnaire and attached complaint. To bar Plaintiffs claim based on this procedural technicality would be contrary to the spirit of the Sixth Circuit's decision in *Haithcock.* Accordingly, the Court rejects Defendant's argument

Id. This is no different than Petitioners in the case at bar when they verbally reported racial slurs and discrimination in the promotion process to the EEOC, alleging the same on his behalf and other African Americans at the City.

According to Darryl Jone's intake form dated September 1, 2004, it states very clearly in a sworn

statement that supervisory personnel were making racial slurs, and that African Americans were "being purposely being overlooked when it comes to promotion." (R. 95 Apx. 1123-1257, Omnibus Supplemental Response to Motions for Summary Judgment as to Petitioners Stephen Gibson 3:06-cv-0810, Michael Jones 3:06-cv-0808, Anthony Pasley 3:06-cv-0809, and Darryl Jones 3:06-cv-0807, Exhibits 1-5, EEOC Documents of Darryl Jones, EEOC Documents of Michael Jones, EEOC Documents 12/02/06 Memorandum, EEOC Documents Stephen Gibson, and EEOC Documents of Anthony Pasley, R. 99, Affidavit of Darryl Jones, R. 100 Affidavit of Michael Jones, R. 101 Affidavit of Anthony Pasley, R. 102 Affidavit of Stephen Gibson)

On May 17, 2006, the Equal Employment Opportunity Commission sent Petitioner Michael Jones a letter detailing his charges of being denied a promotion to the position of captain in 2005 because of his race. (R. 95 Apx. 1123-1257, Omnibus Supplemental Response to Motions for Summary Judgment as to Petitioners Stephen Gibson 3:06-cv-0810, Michael Jones 3:06-cv-0808, Anthony Pasley 3:06-cv-0809, and Darryl Jones 3:06-cv-0807, Exhibits 1-5, EEOC Documents of Darryl Jones, EEOC Documents of Michael Jones, EEOC Documents/ 12/02/06 Memorandum, EEOC Documents of Stephen Gibson, and EEOC Documents of Anthony Pasley, R. 99, Affidavit of Darryl Jones, R. 100 Affidavit of Michael Jones, R. 101 Affidavit of Anthony Pasley, R. 102 Affidavit of Stephen Gibson) In addition, Shirley Harmon, Human Resources Director of the City of Franklin, submitted a written memorandum on December 2, 2006, upon her investigation that Michael Jones had been subjected to a "hostile work place," and

found that Chief Rocky Garzarek, the ultimate decision maker in Michael Jones' promotion attempts and one who witnesses have seen use racial slurs against African Americans, falsely accused Petitioner Michael Jones of covertly taping other employees of the Franklin Fire Department. (R. 95 Apx. 1123-1257, Omnibus Supplemental Response to Motions for Summary Judgment as to Petitioners Stephen Gibson 3:06-cv-0810, Michael Jones 3:06-cv-0808, Anthony Pasley 3:06-cv-0809, and Darryl Jones 3:06-cv-0807, Exhibits 1-5, EEOC Documents of Darryl Jones, EEOC Documents of Michael Jones, EEOC Documents/ 12/02/06 Memorandum, EEOC Documents of Stephen Gibson, and EEOC Documents of Anthony Pasley, R. 99, Affidavit of Darryl Jones, R. 100 Affidavit of Michael Jones, R. 101 Affidavit of Anthony Pasley, R. 102 Affidavit of Stephen Gibson)

On June 28, 2005, Petitioner Stephen Gibson filed his EEOC charge alleging that he had been discriminated against in the promotion process and been subjected to a racially hostile environment that included racial slurs and that such conduct by the Defendant was a "continuing action." (R. 95 Apx. 1123-1257, Omnibus Supplemental Response to Motions for Summary Judgment as to Petitioners Stephen Gibson 3:06-cv-0810, Michael Jones 3:06-cv-0808, Anthony Pasley 3:06-cv-0809, and Darryl Jones 3:06-cv-0807, Exhibits 1-5, EEOC Documents of Darryl Jones, EEOC Documents of Michael Jones, EEOC Documents/ 12/02/06 Memorandum, EEOC Documents of Stephen Gibson, and EEOC Documents of Anthony Pasley, R. 99, Affidavit of Darryl Jones, R. 100 Affidavit of Michael Jones, R. 101 Affidavit of Anthony Pasley, R. 102 Affidavit of Stephen Gibson)

On June 27, 2005, Petitioner Anthony Pasley filed an EEOC charge claiming to have witnessed the disparate treatment of African Americans in the hiring and promotion process of the Franklin Fire Department since August 12, 1985. (R. 95 Apx. 1123-1257, Omnibus Supplemental Response to Motions for Summary Judgment as to Petitioners Stephen Gibson 3:06-cv-0810, Michael Jones 3:06-cv-0808, Anthony Pasley 3:06-cv-0809, and Darryl Jones 3:06-cv-0807, Exhibits 1-5, EEOC Documents of Darryl Jones, EEOC Documents of Michael Jones, EEOC Documents/ 12/02/06 Memorandum, EEOC Documents of Stephen Gibson, and EEOC Documents of Anthony Pasley, R. 99, Affidavit of Darryl Jones, R. 100 Affidavit of Michael Jones, R. 101 Affidavit of Anthony Pasley, R. 102 Affidavit of Stephen Gibson)

Furthermore, Petitioner Pasley charged that African Americans at the Franklin Fire Department have "as a class" been discriminated against in these areas. (R. 95 Apx. 1123-1257, Omnibus Supplemental Response to Motions for Summary Judgment as to Petitioners Stephen Gibson 3:06-cv-0810, Michael Jones 3:06-cv-0808, Anthony Pasley 3:06-cv-0809, and Darryl Jones 3:06-cv-0807, Exhibits 1-5, EEOC Documents of Darryl Jones, EEOC Documents of Michael Jones, EEOC Documents/ 12/02/06 Memorandum, EEOC Documents of Stephen Gibson, and EEOC Documents of Anthony Pasley, R. 99, Affidavit of Darryl Jones, R. 100 Affidavit of Michael Jones, R. 101 Affidavit of Anthony Pasley, R. 102 Affidavit of Stephen Gibson) Petitioner Pasley's intake went into far greater detail about discrimination in the promotion process of African Americans at the Franklin Fire Department. (R. 95 Apx. 1123-1257, Omnibus Supplemental Response to Motions for

Summary Judgment as to Petitioners Stephen Gibson 3:06-cv-0810, Michael Jones 3:06-cv-0808, Anthony Pasley 3:06-cv-0809, and Darryl Jones 3:06-cv-0807, Exhibits 1-5, EEOC Documents of Darryl Jones, EEOC Documents of Michael Jones, EEOC Documents 12/02/06 Memorandum, EEOC Documents of Stephen Gibson, and EEOC Documents of Anthony Pasley, R. 99, Affidavit of Darryl Jones, R. 100 Affidavit of Michael Jones, R. 101 Affidavit of Anthony Pasley, R. 102 Affidavit of Stephen Gibson)

As shown by the documentation received from the Equal Employment Opportunity Commission in response to Petitioners' Freedom of Information Act requests, all Petitioners communicated to the EEOC their complaints of not only a racially hostile environment, but an environment where African Americans were discriminated against in the promotion process.

D. The Court of Appeals failed to properly apply the "piggy- backing" rule

In addition to Petitioners' EEOC filings and those of other African American firefighters, such as Greg Baltimore (Case No. 3:06-cv-0578) and Rick Cotton (Case No. 3:06-cv-0580), the City has been put on notice of complaints by African American firefighters of failure to be promoted because of their race and a racially hostile environment. Under the "single filing" or "piggy backing" rule additional, or subsequent, African American firefighters are not held to the same EEOC charge filing requirements. *Foster v. Ruhrpumpen, Inc.*, 365 F3d 1191 (10th Cir. 2004).

Generally, Petitioners must exhaust their administrative remedies by filing a timely EEOC charge prior to bringing suit. Given the widespread concern over discriminatory employment practices, and the congressional intent behind Title VII, federal courts have universally recognized an exception to the individual filing rule which provides that "in a multi-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement. *Foster v. Ruhrpumpen, Inc.*, 365 F3d 1191; *Allen v. United States Steel Corp.*, 665 F2d 689, 695 (5th Cir. 1982). The principal behind the piggy backing rule is to give affect to the remedial purposes of Title VII. The act of filing a charge is deemed "useless" in situations in which the employer is already on notice that plaintiffs may file discrimination claims, thus negating the need for additional filings. *Foster; Horton v. Jackson County Board of County Commissioners*, 343 F3d 897, 899 (7th Cir. 2003); see also *Thiessen v. General Electric Capital Corporation*, 267 F3d 1095, 1110 (10th Cir. 2001) ("The policy behind the single filing rule is that it would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC.") The only purpose of an administrative charge is to afford the EEOC the opportunity to seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion. *Tolliver v. Xerox Corp.*, 918 F2d 1052, 1057 (2nd Cir. 1990).

The purpose of the EEOC charge filing requirement simply gives the employer notice of the discrimination

claims being brought against it and to provide the EEOC with an opportunity to conciliate the claims. *Id.; Manning v. Chevron Chemical Company,* 332 F3d 874, 878 (5th Cir. 2003). These charges must be construed with the upmost liberality. *Lyons v. England,* 307 F3d 1092, 1104 (9th Cir. 2002). In addition, a charge is sufficient when the EEOC receives from an employee making a charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. 29 CFR § 1601.12(b).

Petitioners' complaints served the central purpose of the administrative exhaustion requirement in that they accused the defendant of race discrimination in hiring and promotion processes, which adversely affected African Americans city-wide all the way back to 1985, and an environment which consisted of decision makers using racial slurs.

The charges did not deprive the EEOC of an opportunity to conciliate the claims as the EEOC could quite easily have discovered in the course of investigating the Petitioners' allegations, facts that substantiate their claims. *Foster v. Ruhrpumpen, Inc.,* 365 F3d 1191 (10th Cir. 2004).

As shown, a total of seven African American firefighters have not only filed EEOC claims alleging discrimination in the hiring and promotion process, but also the use of racial slurs by decision makers. Clearly, the employer has been on notice of the general claims raised by African American firefighters not only on behalf of themselves, but African Americans as a class all the way back to 1985. Both the Trial Court and Appellate Court failed to apply this rule.

CONCLUSION

For the reasons stated above, Petitioners request this Court grant their application.

Respectfully submitted,

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-5180

[Filed February 5, 2009]

DARRYL JONES, MICHAEL JONES, ANTHONY PASLEY, and STEPHEN GIBSON,

Plaintiffs-Appellants,

v.

CITY OF FRANKLIN,

Defendant-Appellee.

OPINION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Before: KENNEDY, COLE, and GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. Darryl Jones, Michael Jones, Anthony Pasley, and Stephen Gibson are black firefighters employed by the City of Franklin, Tennessee. They filed separate complaints in August 2006, alleging that the City failed to promote them because of their race and failed to eliminate a racially hostile work environment. The district court granted summary judgment in favor of the City, holding that the hostile-work-environment claims were not administratively exhausted with the Equal Employment Opportunity Commission (EEOC) and that each of the failure-to-promote claims was either time-barred or not supported by sufficient evidence. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

The four plaintiffs were all hired by the City as entry-level firefighters during the 1980s. Darryl Jones and Stephen Gibson have each been promoted only once, to the rank of engineer. Michael Jones has received two promotions-from firefighter to engineer and then to his current position as a lieutenant. Anthony Pasley has been promoted three times and is currently a captain. During their many years of service, each of the men has applied one or more times for a promotion that he did not ultimately receive. They allege that they possessed similar or superior qualifications to the white applicants who succeeded in being promoted. Accordingly, they complain that the City discriminated against them because of their race by failing to promote them.

The plaintiffs also allege that the City failed to eliminate a racially hostile work environment. They describe many incidents where white firefighters, including high-ranking members of the department, made racially derogatory remarks or engaged in hostile conduct directed at the plaintiffs and other black firefighters. A few of the incidents that they allege are described below.

During Stephen Gibson's initial training period, he was one of only two black trainees in his group. He alleges that his white supervisor imposed a harsher standard of physical performance on the two black trainees, particularly referencing an exercise in which the trainees were required to extinguish fires that were ignited in 55-gallon barrels containing gasoline and diesel fuel. Gibson's supervisor paired him with the other black trainee, and the two were required to perform the exercise four times. White trainees who followed were required to perform the task only once. Because Gibson and his partner went first, they experienced the fire at greater intensity than did the white trainees. Gibson alleges that he sustained severe burns on his face. He also alleges that his supervisor laughed at the injuries and stated that "blacks were afraid of fire."

The plaintiffs' allegations also include the frequent use of racist language in the department, including offensive slurs and other discriminatory comments. Darryl Jones alleges that the same supervisor referred to above by Stephen Gibson once threatened, with rope in hand, to "string [Jones] up." The plaintiffs also describe a meeting of City officials at which candidates for the position of Chief were discussed. A black firefighter was among the applicants, and one official

at the meeting allegedly referred to that candidate by stating that no "rug head" would ever be promoted to Chief.

The plaintiffs further describe several incidents in which white firefighters, including a past Chief and a Deputy Chief, used the word "nigger" to refer to the plaintiffs and other black members of the fire department. On one such occasion, a white woman came to the fire station looking for her husband, who was a black firefighter. She told two white firefighters about marital problems that the couple was experiencing. When she left, one of the white firefighters was overheard saying to the other: "Well, that's what you get for marrying a nigger." Non-plaintiff firefighters, both white and black, as well as other City employees, corroborate the plaintiffs' allegations regarding these and many other incidents in which offensive and discriminatory language was used at the department.

B. EEOC charges

The precise content of the various charges filed by the plaintiffs with the EEOC is key to the resolution of this case. We will therefore describe below each EEOC document that appears in the record.

Darryl Jones completed an EEOC intake form in September 2004. In it, he alleged discrimination on the basis of race, and he wrote that a City employee had "made the racial statement 'Rug Head' while the Fire Department was still in the process of selecting the new Fire Chief." Jones also stated that "Blacks are purposely being overlooked when it comes to promotion positions." He filed his first formal EEOC

charge in January 2005. The charge states that, in July 2004, he received an "unfair evaluation rating that affect[ed] the percentage of raise [he was] to receive." He also alleged that the evaluation scores he received from his supervisor, Michael Jones, had been reduced by the Deputy Chief. In March 2005, Darryl Jones filed a second EEOC charge. He complained that "[t]he City Manager gave false information to the Williamson County Review Appeal Newspaper," and stated his belief that he was being discriminated against in retaliation for the filing of the previous EEOC charge.

Michael Jones filed his first EEOC charge in February 2005, alleging that he had been denied his 2004 annual evaluation. He also described the alleged reduction by the Deputy Chief of the evaluation score that he had given to Darryl Jones. In March 2005, Michael Jones filed another EEOC charge. It contained identical allegations to those in the charge filed by Darryl Jones that same month. Michael Jones filed his third and final EEOC charge in January 2006. That charge stated that he was "being denied promotion because of [his] race, Black, and [his] age, 47." It went on to describe the use by the City of a noncertified test for promotion purposes. "All four Black employees failed the test, but most of the White employees passed the test." The January 2006 charge then described the transfer of "a White administrative captain" to the "shift captain position without any required testing."

In June 2005, Stephen Gibson filed his one EEOC charge. The charge reads as follows:

> I believe because of my race/Black, I have been subjected to a discriminatory selection process

> that has an adverse impact regarding promotional opportunities for blacks as a class. Less qualified whites are systematically promoted over qualified blacks when the Franklin Fire Department continues to change the promotional requirements/job descriptions to advance lesser qualified whites to the ranks of Captain and above.
>
> Recently, a white city official made the racial comment that as long as he had anything to do withpromotions, amg head would never be in charge of a department of the Franklin Fire Department. . . .
>
> The Franklin Fire Department discriminates against blacks as a class in promotional opportunities in violation of Title VII of the Civil Rights Act of 1964, as amended.

Anthony Pasley, the fourth and final plaintiff, completed an undated EEOC intake form. He wrote that "[olver the last few years we have witnessed different incident[s] in our department pertaining to blacks in our department. This complaint pertains to the hiring and promotional process in the City of Franklin Fire Department." Next, he described the addition of a written examination as a requirement in the promotional process, and the reduction in the years of service required as a lieutenant in order to be eligible for promotion to captain. He alleged that the latter change increased the number of white firefighters who were eligible for promotion, and that the overall process was changed to benefit white firefighters. Pasley also filed a formal charge with the

EEOC in June 2005. In the charge he stated that "[f]rom the past few years until now, I have observed disparate treatment of blacks in hiring and promotion."

C. Procedural history

All four plaintiffs received right-to-sue letters from the EEOC after they filed their administrative charges. They filed separate complaints in the district court in August 2006, claiming that the City discriminated against them because of their race by failing to promote them to higher positions within the Fire Department, in violation of 42 U.S.C. § 1981 (Count One); that the City subjected them to discrete acts of racial discrimination and to a racially hostile work environment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Count Two); and that the City deprived them of employment opportunities because of their race in violation of the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.* (THRA) (Count Three). The four cases were consolidated for trial two months later.

After the parties completed discovery, the City moved for summary judgment. The district court granted the City's motion on all claims. Regarding Count One, the court determined that the § 1981 claim was barred because the plaintiffs did not plead a cause of action under § 1983, which provides the exclusive remedy for § 1981 claims brought against a municipality. *See Jett* v. *Dallas Indep. Sch. Dist.*, 591 U.S. 701, 733 (1989). The plaintiffs have not challenged this conclusion on appeal.

Nor do the plaintiffs present any detailed argument for reversing the district court's dismissal of their claims regarding various discrete acts of racial discrimination by the fire department, including lowered evaluation scores, disciplinary actions, and the lack of promotions. These claims were dismissed primarily because of the plaintiffs' failure to provide sufficient evidence to support key elements of their race-discrimination claims. The plaintiffs now argue that we should consider their allegations of discrete acts by the City as "evidence of a racially hostile environment."

Finally, the district court awarded summary judgment to the City on the hostile-work- environment claims brought pursuant to Title VII in Count Two and the THRA in Count Three. In its opinion, the court reasoned that the plaintiffs had not exhausted their administrative remedies with respect to the hostile-work-environment claims. The plaintiffs challenge that conclusion on appeal.

II. ANALYSIS

A. Standard of review

We review de novo the district court's grant of summary judgment. *Znt'l Union* v. *Cummins, Znc.*, 434 F.3d 478, 483 (6th Cir. 2006). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Zndus. Co. v. Zenith Radio Corp.*, 475 US. 574,

587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Znc.*, 477 US. 242, 251-52 (1986).

B. Hostile-work-environment claims

In order to establish a hostile-work-environment claim, a plaintiff must present evidence of harassment that "unreasonably interfer[es] with [his or] her work performance and creat[es] an objectively intimidating, hostile, or offensive work environment." *Grace v. USCAR,* 521 F.3d 655, 678 (6th Cir. 2008). We have little doubt that, but for the administrative-exhaustion requirement, the plaintiffs in this case presented sufficient evidence of hostile, racist behavior in their work environment to survive a motion for summary judgment on this claim. *See Baltimore v. City of Franklin,* No. 3:06-0578, 2007 WL 2123906 at *14-15 (M.D. Tenn. July 20, 2007) (holding, in a companion case to the one before us, that evidence submitted by the black firefighter with the City of Franklin was enough to present a hostile-work-environment claim to a jury where the firefighter had alleged sufficient facts in his EEOC charge to exhaust his administrative remedies).

The issue presented here, however, is whether the present four plaintiffs exhausted their administrative remedies so that the district court could hear their hostile-work-environment claims. *See Strouss v. Mich. Dept. of Corrections,* 250 F.3d 336, 342 (6th Cir. 2001) (noting that district courts may not hear Title VII claims "unless the claimant explicitly files the claim in an EEOC charge or the claim can be reasonably

expected to grow out of the EEOC charge."). In addition, we must consider whether the plaintiffs complied with the one-year statute of limitations under the THRA.

1. Title VII

In granting summary judgment in favor of the City, the district court concluded that the EEOC charges filed by the plaintiffs did not include sufficient allegations to trigger an investigation of the allegedly hostile work environment. The court itemized the plaintiffs' various filings with the EEOC, discussed above, and stated that "[t]he EEOC would not have been prompted to investigate racially derogatory statements and epithets used against . . . African Americans in the Fire Department because no such racial harassment was reported to have occurred." For that reason, the court concluded that the plaintiffs had not exhausted their administrative remedies with respect to the hostile-work-environment claims.

The plaintiffs argue that they provided sufficient notice to the EEOC to satisfy the administrative -exhaustion requirement. But each of the plaintiffs' written filings with the EEOC focused on discrete acts of discrimination, such as the reduction of evaluation scores and the failure of the City to award promotions to the plaintiffs. Only one racist comment was mentioned-the "rug head" remark-and that comment was directly tied to the failure to promote one of the plaintiffs' black colleagues. The plaintiffs claim to have verbally notified EEOC officials about other facts that support their hostile-work-environment claim, but the record contains no evidence beyond bald, nonspecific assertions that they did so.

No decision in this circuit has held that EEOC charges regarding discrete acts of discrimination are alone sufficient to put the EEOC on notice of a hostile-work-environment claim. Several unpublished decisions of this court have in fact held to the contrary. *See, e.g., Brown v. City of Cleveland*, No. 07-3535, 2008 WL4372950 at *8 (6th Cir. Sept. 23, 2008) (holding that an EEOC investigation of a hostile work environment could not reasonably be expected to grow out of a charge describing the denials of a promotion and a handicapped parking space); *Scott v. Eastman Chem. Co.*, 275 F. App'x 466, 475 (6th Cir. April 22, 2008) ("[The plaintiff] failed to exhaust her hostile environment claim, as she offered no evidence that the EEOC actually investigated this claim or that such claims could reasonably be expected to grow out of the charge.").

Published decisions in at least two other circuits have reached similar conclusions. *See Chacko v. Patuxent Inst.*, 429 F.3d 505, 511 (4th Cir. 2005) ("The sharp differences between [the] evidence [presented for trial] and the allegations in [the plaintiffs] administrative charges compel the conclusion that he failed to exhaust his administrative remedies."); *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 503 (7th Cir. 1994) ("When an EEOC charge alleges a particular theory of discrimination, allegations of a different type of discrimination in a subsequent complaint are not reasonably related to them unless the allegations in the complaint can be reasonably inferred from the facts alleged in the charge."). In sum, we agree with the district court's conclusion that the plaintiffs did not alert the EEOC to the offensive incidents they now report. The district court therefore did not err in dismissing the plaintiffs'

hostile-work-environment claims brought under Title VII.

2. THRA

The plaintiffs also brought their hostile-work-environment claims under the THRA. Regarding the THRA, the district court concluded that the claims had not been filed within the one- year limitations period imposed by the statute. *See* Tenn. Code Ann. § 4-21-311(d). On appeal, the plaintiffs argue that, "[g]iven that [they] . . . filed suit within one (1) year of the last act in a hostile environment, their claims are timely." But they identify no specific facts probative of a hostile work environment that occurred during the year that preceded the filing of their complaints. Instead, they simply assert that, "[flor purposes of computing the applicable period of time, it is important to note that Plaintiffs' claims for racial discrimination are under a 'hostile working environment theory.'" Because no allegations were made of specific incidents that occurred within the one-year period, we conclude that the THRA claims are time-barred. *See Brown v. City of springhill,* No. 01:06-0098, 2008 WL 974729 at *4 (M.D. Tenn. April 8, 2008) (holding that where the plaintiffs allegations concerning a hostile work environment consist of facts that occurred more than one year before the filing of the complaint, such a claim is time-barred).

C. Discrete acts of discrimination

We now turn to the plaintiffs' claims that they suffered discrete acts of discrimination on the basis of their race. These claims consist of various evaluation scores that were allegedly reduced by white

supervisors, numerous instances where the plaintiffs assert that they were not promoted because of their race, and one incident in which Darryl Jones contends that he was inappropriately disciplined for conduct that he says never occurred. he district court granted summary judgment on each of these claims after thoroughly analyzing each allegation.

Claims based on several of the discrete acts alleged by the plaintiffs were declared by the district court to be time-barred. Becausetheplaintiffs' EEOC charges were filed more than 300 days after each of these alleged acts, the claims are barred under Title VII. *See Amini v. Oberlin College,* 259 F.3d 493, 498 (6th Cir. 2001) (describing the "dual statute of limitations" under Title VII, pursuant to which an EEOC charge must be filed within 300 days of the discriminatory act in "deferral states," or within 180 days in other states); *Tartt v. City of Clarksville,* 149 F. App'x 456, 460 (6th Cir. 2005) (Tennessee is a "deferral state," meaning that the 300-day statute of limitations applies). Similarly, the plaintiffs filed their complaints in the district court more than one year after these alleged acts occurred, which bars the claims under the THRA. *See* Tenn. Code *Ann.* § 4-21-311(d).

Regarding the remaining allegations of discrete acts of race discrimination, the district court concluded that the plaintiffs had failed to establish a prima facie case. This was true either because there was insufficient proof to establish that the complained-of conduct was an adverse employment action or because the plaintiff who was denied a promotion could not show that he had equal or superior qualifications to the successful candidates. The plaintiffs present no

detailed argument on appeal to challenge these conclusions by the district court.

Addressing each of the alleged discrete acts individually would be duplicative of the district court's thorough analysis and would serve no jurisprudential purpose. Because we agree with that analysis, we adopt the district court's opinion on the plaintiffs' discrete claims of discrimination as our own.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Nos. 3:06-0807; 3:06-0808;
3:06-0809; 3:06-0810

[Filed January 23, 2008]

DARRYL JONES, ET AL.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF FRANKLIN,	)
	)
Defendant.	)
	)

MEMORANDUM

JUDGE ECHOLS

Pending before the Court are Defendant City of Franklin's ("the City's") Motion For Summary Judgment As To Plaintiff Darryl Jones (Docket Entry No. 24), Motion for Summary Judgment As To Plaintiff Michael Jones (Docket Entry No. 35), Motion for Summary Judgment As To Plaintiff Stephen Gibson (Docket Entry No. 46), and Motion For Summary

Judgment As To Plaintiff Anthony Pasley (Docket Entry No. 54), to which the Plaintiffs have responded in opposition and the City has filed replies.

Plaintiffs Darryl Jones, Michael Jones, Stephen Gibson, and Anthony Pasley are African American firefighters employed by the Franklin Fire Department (the "Fire Department"). They filed these discrimination actions against the City on August 21, 2006. Although the facts alleged by each Plaintiff are different, all Plaintiffs claim that the City discriminated against them because of race in failing to promote them to higher positions within the Fire Department, in violation of 42 U.S.C. § 1981 (Count One); that the City subjected them to racial discrimination and retaliation in the promotion process and by requiring them to work in a racially hostile work environment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (Count Two); and that the City deprived them of employment opportunities because of their race in violation of the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.* (hereinafter "THRA") (Count Three). Plaintiffs seek compensatory damages, front pay, back pay, injunctive relief, attorney's fees, costs, and prejudgment interest.

All four Plaintiffs filed administrative charges against the City with the Equal Employment Opportunity Commission ("EEOC"), although the City asserts that certain claims raised in this litigation were not included in the administrative charges presented to the EEOC. All Plaintiffs received right-to-sue letters from the EEOC, and these lawsuits followed.

Because the cases are fact-intensive, the Court will discuss below only those facts necessary to address the issues raised by the City in its Motions For Summary Judgment.

I. STANDARD OF REVIEW

A party may obtain summary judgment if the evidence establishes there are not any genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Covington v. Knox County School Sys.*, 205 F.3d 912, 914 (6th Cir. 2000). The moving party bears the initial burden of satisfying the court that the standards of Rule 56 have been met. *See Martin v. Kelley*, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact that is disputed. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *Covington*, 205 F.3d at 914 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). If so, summary judgment is inappropriate.

To defeat a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue of material fact for trial. If the party does not so respond, summary judgment will be entered if appropriate. Fed. R. Civ. P. 56(e). The nonmoving party's burden of providing specific facts demonstrating that there remains a genuine issue of material fact for trial is triggered once the moving party shows an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S.

at 248. In ruling on a motion for summary judgment, the Court must construe the evidence in the light most favorable to the nonmoving party, drawing all justifiable inferences in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II. ANALYSIS

A. Section 1981 claims

The City contends that all four Plaintiffs fail to state claims under § 1981. Plaintiffs did not address this issue in their briefs. Although § 1981 confers certain rights, the statute itself does not provide a cause of action for race discrimination. In *Jett v. Dallas Independent School Dist.*, 591 U.S. 701, 733 (1989), the Supreme Court held that 42 U.S.C. § 1983 provides the exclusive remedy for § 1981 claims brought against a municipality. In 1991, Congress amended § 1981 to add subsection (c) which states: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

Subsequently, the question arose in the federal courts whether this statutory amendment abrogated *Jett* and created an implied cause of action for § 1981 claims for race discrimination against municipalities. *See Arendale v. City of Memphis*, 2006 WL 3053402 at * 4-6 (W.D. Tenn. 2006); *Powell v. City of Pittsfield*, 143 F.Supp.2d 94, 111 (D.Mass. 2001). In the Sixth Circuit this question has not been resolved by the court of appeals, but district courts continue to follow *Jett*. *See e.g. Arendale*, 2006 WL 3053402 at *5; *Baker*

v. Shelby County Gov't, 2006 WL 2927687 at *2 (W.D. Tenn. 2006); *Hayes v. City of Memphis Police Dept.*, 2006 WL 2882682 at *4 (W.D. Tenn. 2006); *Lowery v. City of Cleveland*, 2006 WL 2010837 at **3-4 (N.D. Ohio 2006); *Johnson v. City of Franklin*, 2005 WL 1661975 at *5 (W.D. Ky. 2005).

In line with these cases, the Court determines that, because Plaintiffs did not plead a cause of action under § 1983, their § 1981 claims against the City are barred under *Jett*. The City is entitled to summary judgment on the § 1981 claims.

B. Hostile work environment claims

The City asserts that the Plaintiffs failed to include allegations of a racially hostile work environment in their administrative charges filed with the EEOC, and therefore, this Court lacks jurisdiction over such claims. The Court will consider the filings of each Plaintiff.

1. Darryl Jones

The City states that Darryl Jones filed his first EEOC charge on January 20, 2005 and his second on March 30, 2005. In the first charge, Jones complained that in July 2004 he received an unfair evaluation rating that affected the percentage raise he was to receive and Lt. Mike Jones' evaluation of him was lowered without explanation by Deputy Chief Todd Horton. (Docket Entry No. 79-1.) In the second charge, Jones complained that the City Manager gave false information to a local newspaper, the *Williamson*

County Review Appeal.[1] In both charges Jones alleged he was discriminated against based on his race. In neither charge did Jones report to the EEOC a racially hostile work environment at the Fire Department. In paragraphs 17 to 20 of the Complaint, however, Jones alleged that he and other African American firefighters were subjected to a racially hostile work environment, listing a number of racially derogatory statements and epithets allegedly made in the workplace. None of the incidents described in the Complaint were included in Jones' EEOC charges. Because Jones did not provide the EEOC with the same list of racially derogatory statements and epithets indicating the existence of a hostile work environment at the Fire Department as listed in the Complaint, the City contends Jones failed to exhaust his administrative remedies and this Court lacks jurisdiction to consider Jones' hostile work environment claim.

"An administrative charge filed with the EEOC that has been prepared by a non-lawyer without assistance from or representation by an attorney should be liberally and broadly construed to encompass all claims reasonably expected to grow out of the EEOC investigation of the charge made." *Seay v. Tennessee Valley Auth.*, 340 F.Supp.2d 844, 849 (E.D. Tenn. 2004). However, "[i]t is well settled that federal courts do not have subject matter jurisdiction to hear Title VII claims unless the claimant explicitly

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[1] The Court is unable to locate a copy of this EEOC charge in the record. Because Jones does not dispute the City's recitation of his second charge, the Court will assume that the charge reads as it is quoted in the City's Memorandum. (Docket Entry No. 26 at 5.)

files the claim in an EEOC charge or the claim can be reasonably expected to grow out of the EEOC charge." *Strouss v. Michigan Dept. of Corrections*, 250 F.3d 336, 342 (6th Cir. 2001); *Tartt v. City of Clarksville*, 149 Fed.Appx. 456, 460-461 (6th Cir. 2005). In determining the scope of an EEOC charge, the facts alleged in the body of the charge, and not the boxes marked on the charge, are the primary determinant. *Shorter v. Memphis Light, Gas & Water Co.*, 252 F.Supp.2d 611, 625 (W.D. Tenn. 2003).

Here, a hostile work environment claim would not reasonably be expected to grow out of Jones' EEOC charges. *See King v. Tecumseh Public Schools*, 229 F.3d 1152, 2000 WL 1256899 (6th Cir. 2000) (unpublished) (observing sex discrimination and sexual harassment claims are not alike or reasonably related unless there is a factual relationship between them; plaintiff failed to allege facts in EEOC charge to prompt EEOC to investigate sexual harassment claim). The EEOC would not have been prompted to investigate racially derogatory statements and epithets used against Jones or other African Americans in the Fire Department because no such racial harassment was reported to have occurred. *See Davis v. Sodexho, Cumberland College Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998). If, as Jones alleges, the Fire Department was permeated for years with severe and pervasive racial harassment, he had adequate opportunity to bring his concerns to the attention of the EEOC in the two administrative charges he filed, but he did not do so.

Jones provides copies of two intake questionnaires he completed at the EEOC on September 1, 2004, along with a sheet entitled, "Racial Discrimination."

(Docket Entry No. 95-1 at 9-14.) It is not clear to the Court why the date on each questionnaire (September 1, 2004) is earlier than the undisputed dates of Jones' EEOC charges, which were filed on January 20, 2005 and March 30, 2005. Even assuming that the September 1, 2004 documents are relevant to the 2005 charges, the Court determines that they do not advance Jones' argument that he notified the EEOC of a hostile work environment claim.

The first questionnaire provides very little information; it states only that all blacks in the Fire Department were treated similarly and that the whole department would have relevant information. Jones stated he was seeking fair treatment and that he had been advised to contact the EEOC by the NAACP. (Docket Entry No. 79-1 at 5-9.) The sheet titled "Race Discrimination" stated, among other things, that "David Parker of the Engineering Department made the racial statement 'Rug Head' while the Fire Department was still in the process of the selecting (sic) the new Fire Chief." (*Id.* at 10.) Jones also reported that the statement was witnessed by the City Administrator and other department heads, but "Parker was never disciplined till Jay Johnson, the City Administrator, was forced to take action (verbal reprimand)." Jones also stated that blacks were purposely overlooked for promotions, and he challenged the "evaluation for raises," including the hiring process for minorities. (*Id.*)

The sheet clearly linked the "rug head" comment to the process of selecting the new Fire Chief. Jones did not include in his EEOC charges or questionnaires any of the allegations of racial harassment that he included in his Complaint at paragraphs 17 to 20.

Moreover, the "rug head" comment is not included in the Complaint at all, let alone as supportive of a hostile work environment claim.

In the second intake questionnaire, Jones stated: "Over the last few years, we have witnessed different incidents in our department pertaining to blacks in our department. This complaint pertains to the hireing (sic) and promotional process in the city of Franklin fire dept." (Docket Entry No. 79-1 at 12.) Jones complained that the promotions process was changed so that white firefighters could meet the promotion qualifications when they did not have years of experience in the Fire Department, whereas black firefighters were deemed not qualified for promotions.

None of this information reasonably would have prompted the EEOC to investigate a claim of a racially hostile work environment. The evidence is insufficient to show that Jones raised the issue of a hostile work environment with the EEOC in either of his two charges filed in 2005 or in any communications he had with the EEOC in 2004. Therefore, the City is entitled to summary judgment against Jones on his hostile work environment claim under Title VII because Jones failed to assert the claim before the EEOC and this Court lacks jurisdiction to consider it now. *See Strouss*, 250 F.3d at 342; *Tartt*, 149 Fed.Appx. at 460-461.

Jones' hostile work environment claim brought under the THRA is time-barred. Such a claim is subject to a one-year statute of limitations that is not tolled while administrative charges are pending. Tenn. Code Ann. § 4-21-311(d); *George v. Aventis Pharmaceutical, Inc.*, 252 F.Supp.2d 599, 607 (W.D. Tenn. 2003); *Pearison v. Pinkerton's, Inc.*, 2003 WL

21212651 at *4-5 (E.D. Tenn. 2003). Because Jones filed suit on August 21, 2006, he must identify acts constituting a racially hostile work environment under state law occurring in the year prior to that date. Jones testified that the last racial comment, joke or slur he heard at the Fire Department was in 2002, when former Chief Don Claiborne used the word "wigger." (Docket Entry No. 51-2, Jones Depo. at 196.) This alleged comment occurred approximately three years before the limitations period began in August 2005. Jones did not respond to the City's time-bar argument concerning his THRA claim; thus, he has not produced evidence to show that his THRA claim should survive summary judgment. The City is entitled to summary judgment on the THRA hostile work environment claim.

2. Michael Jones

Michael Jones filed three EEOC charges on February 4, 2005, March 30, 2005, and January 18, 2006. (Docket Entry Nos. 47-3 through 47-5.) In the first charge, Jones identified the last date the alleged discrimination occurred as July 1, 2004. He complained that he was denied an annual evaluation from July 1, 2004 to the present, and when he asked the evaluator, an Assistant Chief, why he had not received an evaluation, the Assistant Chief did not give an answer and laughed at him. Jones also stated in the charge that he gave a high rating to a black subordinate and the same Assistant Chief overruled the rating and lowered the employee's score. No mention was made in the charge of a racially hostile work environment at the Fire Department.

In the second EEOC charge filed in March 2005, Jones complained that the City Manager gave false information to a local newspaper, the *Williamson County Review Appeal*. Again, no mention was made of a hostile work environment at the Fire Department. In the third charge filed in January 2006, Jones complained that he was denied promotions because of his race and age, and he challenged testing procedures for promotion. Jones did not mention any claim for a hostile work environment.

In paragraphs 18 to 23 of the Complaint, however, Jones alleged that he and other African American firefighters were subjected to a racially hostile work environment, listing a number of racially derogatory statements and epithets allegedly made in the workplace. None of the incidents described in the Complaint were included in Jones' EEOC charges. Because Jones did not provide the EEOC with the same list of racially derogatory statements and epithets indicating the existence of a hostile work environment at the Fire Department as listed in the Complaint, the City contends Jones failed to exhaust his administrative remedies and this Court lacks jurisdiction to consider Jones' hostile work environment claim.

Jones is entitled to have his administrative charges construed liberally and broadly to encompass all claims reasonably expected to grow out of the EEOC investigation of the charges made. *See Seay*, 340 F.Supp.2d at 849. However, this Court does not have subject matter jurisdiction to hear Title VII claims unless the claimant explicitly files the claim in an EEOC charge or the claim can be reasonably expected

to grow out of the EEOC charge. *See Strouss*, 250 F.3d at 342.

Here, a hostile work environment claim would not reasonably be expected to grow out of any of Jones' three EEOC charges. The EEOC would not have been prompted to investigate racially derogatory statements and epithets used against Jones or other African Americans in the Fire Department because no such racial harassment was reported to have occurred. *See Davis*, 157 F.3d at 463. If, as Jones alleges, the Fire Department was permeated for years with severe and pervasive racial harassment, he had adequate opportunity to bring his concerns to the attention of the EEOC in one or more of the three charges he filed, but he did not do so.

Jones asserts that a hostile work environment claim reasonably could grow out of his administrative charges because on May 17, 2006, the EEOC investigator sent him a letter detailing his charge concerning denial of a promotion to captain in 2005 on account of his race. (Docket Entry No. 95-2.) The fact that the EEOC investigator parroted to Jones his complaints about denial of promotion does not establish in any way that Jones raised a hostile work environment claim before the EEOC. The investigator's letter does not make any reference to a hostile work environment or to any claims Jones made that he or others were subjected to racial epithets or other racially harassing conduct in the workplace.

Jones also asserts that a hostile work environment claim reasonably could grow out of his administrative charges because Shirley Harmon, the City's Human Resources Director, submitted to the EEOC a

memorandum dated December 2, 2006, which was written by Richard Stokes, a Municipal Human Resource Consultant. (Docket Entry No. 95-3.) In that memorandum, Stokes described his investigation into a complaint of a hostile work environment in the Fire Department. He summarized the content of interviews he conducted with members of the Fire Department on November 27, 2006, and gave the results of his investigation. Even if the City submitted this memorandum to the EEOC as Jones alleges, the Court fails to see how the Stokes memorandum supports a finding that the EEOC was on notice of a hostile work environment claim brought by Jones. The Stokes Memorandum is dated December 2, 2006. The EEOC issued a right-to-sue letter to Jones six months earlier on June 2, 2006. (Docket Entry No. 1, Complaint, Attachment.) Jones filed this suit on August 21, 2006. Thus, the EEOC's investigation into Jones' administrative charges had terminated and Jones had filed this lawsuit months before the Stokes memorandum was even written. This is insufficient evidence to show that Jones raised the issue of a racially hostile work environment with the EEOC in any of his three charges filed in 2005 and 2006. Therefore, the City is entitled to summary judgment against Jones on his hostile work environment claim under Title VII because Jones failed to assert the claim before the EEOC and this Court lacks jurisdiction to consider it now. See Strouss, 250 F.3d at 342; *Tartt*, 149 Fed.Appx. at 460-461.

Jones' hostile work environment claim brought under the THRA is time-barred. Such a claim is subject to a one-year statute of limitations that is not tolled while administrative charges are pending. Tenn. Code Ann. § 4-21-311(d); *George*, 252 F.Supp.2d at 607;

Pearison, 2003 WL 21212651 at *4-5. Because Jones filed suit on August 21, 2006, he must identify acts constituting a racially hostile work environment under state law occurring in the year prior to that date. Jones did not respond to the City's time-bar argument concerning his THRA claim; thus, he has not produced evidence to show that his THRA claim should survive summary judgment. The City is entitled to summary judgment on the THRA hostile work environment claim.

3. Stephen Gibson

Stephen Gibson filed one EEOC charge on June 28, 2005. In it he complained that the Fire Department denied promotions to African Americans as a class. He also stated: "Recently, a white city official made the racial comment that as long as he had anything to do with promotions, a rug head would never be in charge of a department of the Franklin Fire Department." (Docket Entry No. 45, Ex. 4.) The administrative charge clearly linked the "rug head" comment to the denial of promotions to African Americans. Gibson did not include in his EEOC charge any of the allegations of racial harassment that he included in his Complaint at paragraphs 19 and 20. Moreover, the "rug head" comment is not included in the Complaint at all, let alone as supportive of a hostile work environment claim.

The facts related to Gibson's June 2005 charge would not have prompted the EEOC to investigate a hostile work environment claim. Rather, the EEOC would have been concerned with the comment as it related to denying promotions to African Americans. The EEOC would not have been prompted to

investigate other racially derogatory statements and epithets used as to African Americans in general throughout the Fire Department as a whole because no such facts were alleged. *See Davis*, 157 F.3d at 463. If, as Gibson alleges, the Fire Department was permeated for years with severe and pervasive racial harassment, he had adequate opportunity to bring his concerns to the attention of the EEOC in the charge he filed, but he did not do so. Because the Court lacks subject matter jurisdiction over Gibson's Title VII hostile work environment claim, the Court concludes that the City is entitled to summary judgment on that claim.

Gibson's hostile work environment claim brought under the THRA is time-barred. Such a claim is subject to a one-year statute of limitations that is not tolled while administrative charges are pending. Tenn. Code Ann. § 4-21-311(d); *George*, 252 F.Supp.2d at 607; *Pearison*, 2003 WL 21212651 at *4-5. Because Gibson filed suit on August 21, 2006, he must identify acts constituting a racially hostile work environment under state law occurring in the year prior to that date. Gibson testified that none of the alleged racial comments about him or other African American firefighters was made in his presence. He testified further that he learned in early 2006 that a racial comment had been made about him two to three years before that. (Docket Entry No. 45, Gibson Depo. at 38-40.) Gibson has not identified any racially harassing conduct that occurred during the limitations period. Gibson did not respond to the City's time-bar argument concerning his THRA claim; thus, he has not produced evidence to show that his THRA claim should survive summary judgment. The City is entitled to summary judgment on the THRA hostile work environment claim.

4. Anthony Pasley

Anthony Pasley filed an administrative charge with the EEOC on June 27, 2005. He complained of "disparate treatment of blacks in hiring and promotion" and alleged that he had been discriminated against based on his race. He also alleged: "Blacks as a class have been treated this way." (Docket Entry No. 49-2.) Pasley's charge did not mention any racial harassment or complain of a racially hostile work environment. In paragraphs 16 to 20 of the Complaint, however, Pasley alleged that he and other African American firefighters were subjected to a racially hostile work environment, listing a number of racially derogatory statements and epithets allegedly made in the workplace. None of the incidents described in the Complaint were included in Pasley's EEOC charge. Because Pasley did not provide the EEOC with the same list of racially derogatory statements and epithets indicating the existence of a hostile work environment at the Fire Department as listed in the Complaint, the City contends Pasley failed to exhaust his administrative remedies and this Court lacks jurisdiction to consider his hostile work environment claim.

In an effort to contradict the City's position, Pasley supplies a letter he received from the EEOC investigator and a copy of the intake questionnaire he completed for the EEOC. (Docket Entry No. 95-5 at 10, 14-18.) The letter to Pasley dated May 17, 2006, does not advance his position that he did raise a hostile work environment claim to the EEOC. The letter addressed only Pasley's claim that he was denied promotion and concluded that there was insufficient evidence to support such a claim. In the intake

questionnaire, Pasley did not mention hostile work environment, racial harassment, or any racial epithets or remarks heard in the workplace. Rather, he focused on his claim that African Americans were denied promotions by the City's actions in changing qualification standards. When asked, "What other information do you think is relevant to this charge?" Pasley wrote: "Past statements that have been made by past and previous leaders in the department." But this general reference to "past statements" would not reasonably put the EEOC on notice that it should investigate a hostile work environment claim. This is insufficient evidence to show that Pasley raised the issue of a hostile work environment in his EEOC charge. Therefore, the City is entitled to summary judgment against Pasley on his hostile work environment claim under Title VII because he failed to assert the claim before the EEOC and this Court lacks jurisdiction to consider it now. *See Strouss*, 250 F.3d at 342; *Tartt*, 149 Fed.Appx. at 460-461.

Pasley's hostile work environment claim brought under the THRA is time-barred. Such a claim is subject to a one-year statute of limitations that is not tolled while administrative charges are pending. Tenn. Code Ann. § 4-21-311(d); *George*, 252 F.Supp.2d at 607; *Pearison*, 2003 WL 21212651 at *4-5. Because Pasley filed suit on August 21, 2006, he must identify acts constituting a racially hostile work environment under state law occurring in the year prior to that date. Pasley testified that he could not remember the last time he heard a racial comment made at the Fire Department. (Docket Entry No. 49, Pasley Depo. at 59.) Pasley did not respond to the City's timebar argument concerning his THRA claim; thus, he has not produced evidence to show that his THRA claim should

survive summary judgment. The City is entitled to summary judgment on the THRA hostile work environment claim.

C. Alleged discrete acts of discrimination

Before bringing suit under Title VII for discrete acts of racial discrimination, a plaintiff is required to file timely charges with the EEOC within 300 days of each discrete discriminatory act at issue or lose his ability to recover for that act. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). Each decision to deny a promotion and each performance evaluation is a discrete act which "occurred" on the day the event "happened." *See id.* Under the THRA, a plaintiff is required to bring claims of racial discrimination within one year after the action "ceased." Tenn. Code Ann. § 4-21-311(d).

To establish a *prima facie* case of race discrimination, a plaintiff must show that (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) he was replaced by, or treated differently than, a similarly situated employee who is not a member of the protected class.[2] *See Laderach v. U-Haul of Northwestern Ohio*, 207 F.3d 825, 828 (6th Cir. 2000). Under the second element, an "adverse employment action" is a "materially adverse change in the terms or conditions of the plaintiff's employment caused by the employer's actions." *Bowman v.*

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[2] 2The Court may consider together the theories brought under Title VII and the THRA. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992).

Shawnee State Univ., 220 F.3d 456, 461-462 (6th Cir. 2000). The materially adverse change must be more disruptive than a mere inconvenience or an alteration of job responsibilities and might be indicated by termination, demotion with a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to the position. *Id.*

In a failure to promote case, the Plaintiff must demonstrate that (1) he is a member of a protected class; (2) he applied for and was qualified for a promotion; (3) he was considered for and denied the promotion; and (4) an individual of similar qualifications who was not a member of the protected class received a promotion at the time the Plaintiff's request for promotion was denied. *White v. Columbus Metro. Housing Auth.*, 429 F.3d 232, 240 (6th Cir. 2005).

Once the Plaintiff establishes a *prima facie* case, an inference of discrimination arises. *See Laderach*, 207 F.3d at 828. The burden of production then shifts to the Defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action or for denying a promotion. *See id.* Once that reason is identified, the burden shifts back to the Plaintiff to prove that his employer's articulated non-discriminatory reason for its action was merely a pretext for unlawful racial discrimination. *Id.* To show pretext, a Plaintiff must prove the employer's asserted reason had no basis in fact, the reason did not in fact motivate the adverse employment action, or the reason was insufficient to motivate the adverse employment action. *Id.* The Plaintiff carries the ultimate burden to

prove race discrimination by a preponderance of the evidence. *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1246 (6th Cir. 1995).

Each Plaintiff claims that he was subjected to various discrete acts of race discrimination. The Court will address the claims of each Plaintiff in turn.

1. Darryl Jones

a. Lowered evaluation - 2004

In his January 20, 2005 EEOC charge and in his Complaint, Jones alleged that his performance evaluation score was lowered in July 2004 as a result of race discrimination. Jones cannot establish a *prima facie* case of race discrimination because he cannot show that he was subjected to an adverse employment action. Jones testified that he received good evaluations until 2004. (Darryl Jones Depo. at 17-18.) At various times, he worked in five different fire stations, and in 2004, his superior officer, Lt. Jerrol Coats, gave him a lower evaluation rating than he had received in the past. Jones thought he received "a 2.36 or 3.36 or -38" (*id.* at 19), whereas in the past he had received evaluation scores as high as 3.6 or 3.8. Jones further testified that a satisfactory rating should be above 2.3 or 2.4. (*Id.* at 20-21.) Jones complained to Coats about the evaluation. Coats responded, "Well, buddy, I was given a bad evaluation by Assistant Chief Culberson last year, you know, and I just – I just did the best that I could do." (*Id.* at 22-23.) This comment is not evidence of, nor does it reasonably require an inference, that Jones' race prompted Coats to lower the evaluation. Despite the lowered score, Jones received a raise in July 2004 of an extra $15 to $20 per week.

Because he was topped out on the pay scale for an engineer, Jones received a lump sum check, something like a bonus. (*Id.* at 23-25.) Thus, Jones has not shown that he suffered an adverse employment action. *See Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) ("Satisfactory ratings in an overall evaluation, although lower than a previous evaluation, will not constitute an adverse employment action where the employee receives a merit raise.")

Although Jones informed the EEOC that the lowered evaluation reduced the percentage amount of the raise he was entitled to receive, Jones failed to address the merits of his performance evaluation claims in opposition to summary judgment. He did not present any evidence to show that he received a reduced raise as a result of the lowered evaluation in 2004. (Docket Entry No. 67, Plaintiff Darryl Jones' Statement of Undisputed Facts ¶ 3; Docket Entry No. 26, Memorandum.) Therefore, the Court must conclude that Jones has not carried the second element of his *prima facie* case to show a materially adverse employment action arising from the 2004 lowered evaluation. *See Laderach*, 207 F.3d at 828. The City is entitled to summary judgment on this claim.

b. Lowered evaluation - 2005

Jones complains that his performance evaluation was lowered in 2005. It does not appear that he raised this issue in his administrative charge filed with the EEOC. Jones' January 30, 2005 charge stated that his evaluation was lowered in 2004, a matter addressed above, and that Lt. Mike Jones' evaluation of him was lowered without explanation by Deputy Chief Todd Horton. Jones testified, however, that Lt. Mike Jones

did not evaluate him until 2006. (Jones Depo. at 108.) Jones also testified that evaluations were completed around July each year; thus, his January 2005 EEOC charge could not have addressed an evaluation given in July 2005 or July 2006. The Court believes that it lacks jurisdiction to consider this claim. *See Strouss*, 250 F.3d at 342.

Even if the Court has jurisdiction, Jones cannot prove a *prima facie* case because he has not shown that he suffered a materially adverse employment action as a result of the lowered 2005 evaluation, nor has he produced any evidence that a white firefighter with a similar score was treated better than he was. Although Jones received a score of 3.5 or 3.6 when he was accustomed to receiving a score around 3.8, (Jones Depo. at 32), Jones nonetheless received, like all other firefighters, a three percent (3%) cost of living adjustment. No merit raises were awarded. Jones received his pay increase in a lump sum because he was already at the top of the engineer pay scale. Because Jones fails to set forth a *prima facie* case on this issue, the City is entitled to summary judgment. *See Laderach*, 207 F.3d at 828.

c. Lowered evaluation - 2006

Jones alleges his performance evaluation score was lowered in 2006. The Court believes that it lacks jurisdiction to consider this claim because Jones did not file an EEOC charge in 2006 challenging this evaluation. *See Strouss*, 250 F.3d at 342. Even if the Court has jurisdiction, Jones cannot prove a *prima facie* case because he has not shown that he suffered a materially adverse employment action as a result of the lowered 2006 evaluation, nor has he produced any

evidence that a white firefighter with a similar score was treated better than he was. Jones admits that he received another lump sum bonus equivalent to a two to two and one-half percent raise. (Jones Depo. at 109-110.) Because Jones fails to set forth a *prima facie* case on this issue, the City is entitled to summary judgment. *See Laderach*, 207 F.3d at 828.

d. Personnel Board decision

Jones was disciplined in 1997 for performing managerial duties for his janitorial services company while he was on sick leave from the Fire Department in violation of department policy. Jones alleges the Personnel Board's disciplinary decision was racially discriminatory. However, at his deposition, Jones could not say the Personnel Board was biased or discriminatory because "I don't like to accuse people of something that I can't say they are, but I just consider they were wrong. . . . Again, I can't sit here and–and say they were discriminating. I mean, that's –I don't want to call them a racist or whatever." (Jones Depo. at 119.)

This incident occurred nearly ten years before Jones filed suit in this case. He did not file a timely charge of discrimination with the EEOC. Thus, the claim is barred by the 300-day period for filing under Title VII, as well as the one-year statute of limitations under the THRA.

Jones is not entitled to resurrect this stale claim by relying on the second continuing violation theory; in other words, by showing that the City had a longstanding and demonstrable policy of discrimination. Last year, the Sixth Circuit reversed

this Court's decision in *Austion v. City of Clarksville*, 244 Fed.Appx. 639 (6th Cir. 2007), where the Court applied the second continuing violation theory. The appellate court wrote that a plaintiff seeking to invoke the theory must demonstrate something more than the existence of discriminatory treatment in his case. The plaintiff must establish that the employer's "'standard operating procedure'" included intentional discrimination against the class of which plaintiff was a member. *Id.* at 647. The court explained that unrelated incidents of discrimination will not suffice to invoke the exception; rather there must be a continuing over-arching policy of discrimination. Id. The exception must be strictly construed and it is "satisfied only where the defendant has a known policy or rule supporting discrimination." Id. The court cited *Dixon v. Anderson*, 928 F.2d 212, 217 (6th Cir. 1991) as an example of a proper showing of an over-arching policy of discrimination where in that case the policy plainly appeared in the Ohio Revised Code and administrators openly adhered to the Code. *Id.* By contrast, in *Austion*, the plaintiff presented statistical and documentary evidence to support his assertion that the second continuing violation theory applied in his case. The Sixth Circuit concluded, however, that "the evidence fails to demonstrate that Clarksville maintained a 'standard operating procedure' of discriminating against African-Americans." *Id.* The appellate panel concluded that this Court erred in applying the exception. *Id.*

Plaintiff's record in this case does not contain even the same level of statistical or documentary evidence that was rejected by the Sixth Circuit in *Austion*. Plaintiff has not produced evidence that the City maintains a known policy or rule supporting race

discrimination. Therefore, Plaintiff cannot invoke the second continuing violation theory under Title VII.

As to the THRA claim in *Austion*, the Sixth Circuit held that this Court should not have applied the continuing violation theory under Tennessee law. Citing *Booker v. Boeing Co.*, 188 S.W.3d 639, 647 (Tenn. 2006) and *Weber v. Moses*, 938 S.W.2d 387, 391 (Tenn. 1996), the court observed that the THRA's statute of limitations does not operate to extend the limitations period on discrete acts of discrimination. *Id.* at 648. Here, Jones is complaining about a discrete act of alleged discrimination which occurred in 1997. He is not entitled to the benefit of the continuing violation theory under Tennessee law as explained in *Austion*.[3] Consequently, Jones' claim of discrimination by the Personnel Board is time-barred under Title VII and the THRA and the Court lacks jurisdiction to consider it. The City is entitled to summary judgment on this claim.

e. Lieutenant promotion in 2002

Jones claims that former Fire Chief Don Claiborne told him in 2002 that he could not apply for Lieutenant, even though Jones felt he was qualified for the position. This claim is time-barred. Jones did not file a charge with the EEOC within 300 days after this occurrence. His first EEOC charge was filed in

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[3] The Court acknowledges that it applied the continuing violation theory in plaintiffs' favor in the related case of *Baltimore v. City of Franklin*, 2007 WL 2123906 (M.D. Tenn. July 20, 2007). However, the Court decided *Baltimore* approximately ten days before the Sixth Circuit issued its *Austion* decision. The Court is now bound to follow the Sixth Circuit's teaching in *Austion*.

January 2005. He also did not file suit within one year after the 2002 Lieutenant promotion process ended. Rather, he filed suit in August 2006. As explained above, Jones is not entitled to the benefit of the continuing violation theory under Title VII or the THRA. Thus, the City is entitled to summary judgment on this claim.

f. Fire Officer I

Jones alleges that in 2002, Chief Claiborne told him he could not attend school to receive his Fire Officer I certification because no money was available to pay for the school. Jones began the process to receive this certification in 2006. He did not ask to attend the school between 2002 and 2006. (Jones Depo. at 131-132, 134-135.)

This claim is also time-barred. Jones did not file a charge with the EEOC within 300 days after this denial of training in 2002. His first EEOC charge was filed in January 2005. He also did not file suit within one year after this incident, but waited until August 2006 to sue. As explained above, Jones is not entitled to the benefit of the continuing violation theory under Title VII or the THRA. Thus, the City is entitled to summary judgment on this claim.

g. Lieutenant promotion in 2005

Jones submitted his resume for Lieutenant in August 2005, but he did not have Fire Officer I certification, which was a requirement for the position. Caucasian engineers Ben Marler and Greg Wild were promoted to Lieutenant in March 2006. They were ranked first and second on the promotion certification

list and they had greater qualifications than Jones, including Fire Officer I certifications. Marler was certified as an Apparatus Operator, Firefighter II, Fire Instructor I and Safety Officer. He completed three years of college education at Auburn University and two years in fire science at a community college. Wild served as Lieutenant, Captain and Battalion Chief in New York. He was certified as an Apparatus Operator, Firefighter I and II, Safety Officer I and Fire Instructor I.

Jones did not file an EEOC charge about this denial of promotion. The EEOC could not reasonably have been expected to investigate this claim as an outgrowth of Jones' January and March 2005 charges because this promotion process had not yet occurred. The Court lacks subject matter jurisdiction to hear this claim. *See Strouss*, 250 F.3d at 342. Even if the Court had jurisdiction, Jones has not established a *prima facie* case of discrimination because he has not shown that he was as qualified as those who were promoted to Lieutenant. The City is entitled to summary judgment on this claim.

h. Administrative Captain

Jones alleges that he was told he was not qualified for an Administrative Captain position. He complains that a training officer, who was a Captain, was transferred to Administrative Captain, which is a shift commander position, after he had an accident. Jones admits that he was not qualified to be a Captain.

The Court lacks jurisdiction over this claim because Jones did not raise it in an EEOC charge and the claim is now time-barred under Title VII and the THRA. *See*

Strouss, 250 F.3d at 342; Tenn. Code Ann. § 4-21-311(d). Even so, because Jones admits he was not qualified for the position, he cannot establish a *prima facie* case of race discrimination. *See Laderach*, 207 F.3d at 828. The City is entitled to summary judgment on this claim. Accordingly, none of the claims brought by Darryl Jones survives the City's summary judgment motion.

2. Michael Jones

a. Events prior to first EEOC charge

Plaintiff Michael Jones claims that several events prior to 2004 were racially discriminatory, including the Lieutenant promotion processes in 1998, 2000, and 2001, and lowered evaluations he received in 2000 and 2001. Jones did not file an EEOC charge until February 4, 2005. At that time, he claimed that he was denied an evaluation on July 1, 2004. Jones did not file any EEOC charges with respect to the events he now challenges in 1998, 2000 and 2001. These events are beyond the scope of his first EEOC charge, and the Court lacks jurisdiction to hear the claims. *See Strouss*, 250 F.3d at 342.

Moreover, the claims are time-barred under Title VII and the THRA. Jones did not file an EEOC charge within 300 days of each challenged event. *See id.* He also did not file suit within one year after each of these events occurred. *See* Tenn. Code Ann. § 4-21-311(d). For the reasons explained above, Jones cannot invoke the continuing violation theory under Title VII or the THRA to save these claims. *See Austion*, 244 Fed.Appx. at 647-648. Thus, the City is entitled to summary judgment on these claims.

b. Missed evaluation in 2004

In his February 2005 EEOC charge, Jones alleged that he did not receive an evaluation in July 2004. His supervisor at the time was then-Assistant Chief Todd Horton, who was at the time making a transition to Deputy Chief. Mike Culberson was Jones' immediate supervisor and Captain. Culberson was out on sick leave during the evaluation period and was moving into the role of Assistant Chief to replace Todd Horton. Despite not receiving an evaluation, Jones, like all other city employees, received an across-the-board cost of living adjustment for 2004, rather than a performance-based raise. (Michael Jones Depo. at 40.) The lack of an evaluation did not affect Jones' pay, nor did it affect the days and shifts he worked. (*Id.* at 41.) Jones testified: "It didn't affect nothing as far as me coming to work . . . I just felt that at the time that I was being overlooked because I was the only one in the department that did not receive one in ... the fire department." (*Id.*)

Jones cannot establish a *prima facie* case of race discrimination under Title VII or the THRA because he has not produced evidence that he suffered a materially adverse employment action. Even if he had received an evaluation, he would not have gotten a performance-based raise that year, and he received the cost-of-living raise. *See Hollins*, 188 F.3d at 662. Additionally, the claim appears to be time-barred under the THRA because Jones did not file suit within one year after he was denied an evaluation, *see* Tenn. Code Ann. § 4-21-311(d), and he cannot rely on the continuing violation theory to save this claim. *See Austion*, 244 Fed.Appx. at 647-648. The City is entitled to summary judgment on this claim.

c. Captain promotion in 2006

A job announcement for open Captain positions was posted on August 10, 2005. The minimum requirements included a high school diploma or GED with an Associate's Degree in Fire Science preferred. Candidates were required to have at least one year of experience as a Lieutenant with the Fire Department and possess certifications for Firefighter II and Fire Officer I with Fire Instructor preferred. Jones applied for a promotion to Captain.

That year, Chief Rocky Garzarek used an outside company to design new promotional tests for the rank of Lieutenant, Captain, and Assistant Chief. The promotional tests were not "content validated," and the new Human Resources Director, Shirley Harmon, later learned that, unbeknownst to her, Chief Garzarek served as the subject material expert for the tests with the outside agency, which is an unacceptable practice. Ms. Harmon also learned of certain security issues in the way the tests were handled. The original tests were supposed to be mailed to Ms. Harmon and not opened by anyone but her. She learned, however, that Deputy Chief Todd Horton gained possession of the examinations and made his own copies before the tests were given. More than half of the individuals who took the tests failed, and all of the African Americans failed. As a result, the promotional testing process was stopped.

Thereafter, the Fire Department returned to its more traditional promotion process, which involved use of an assessment center. Evaluators from outside the City of Franklin scored the promotion candidates. During the simulation exercise of the assessment

center, Deputy Chief Todd Horton acted as a dispatcher. Although Horton was not an evaluator, Jones believed that Horton was able to influence the evaluators through his body language. Jones also believed that one of the evaluators, Mark Watty, would not give him a fair assessment because Watty once worked with Horton at the Williamson County Rescue Squad. Jones knew Mr. Watty prior to the assessment center and volunteered for him at one time at the Franklin Fire Department. Jones did not know the other two evaluators and had no reason to suspect that they would unfairly assess his performance.

Jones alleges that Horton made a comment to influence the evaluators during scoring. After watching a videotape of the simulation and scoring process, Jones determined that Horton said something to the evaluators, but he was not able to understand what Horton said. Jones does not know whether Horton tried to influence his score, either positively or negatively. Jones was most concerned that Horton was in the room during the simulation. Even if Horton tried to influence Jones' score positively, Jones believed the assessment center was still unfair because Horton's presence in the room made Jones nervous. Jones admitted that, if the Fire Department responded to a fire, Horton likely would be at the fire scene, he would take command, and Jones would have to deal with him.

Of nineteen candidates, Jones received the lowest score on the tactical portion of the assessment center. However, he scored better than other candidates on the company training and problem employee portions of the assessment center, as well as on the Chief's interview. Jones ranked 17th out of 19 candidates on

the final promotion certification list. (Docket Entry No. 121, Ex. L at 1.) Thirteen of the candidates were promoted to Captain.

Of the successful candidates, four held bachelor's degrees, three were pursuing bachelor's degrees or had college credit above an associate's degree, and five held associate's degrees. Nine were certified as Fire Officer II or higher, eleven were certified as Instructor I, and four were certified as Safety Officer. Six had served as Lieutenant for more than three years, and two were African American. (Docket Entry No. 121, Ex. L.) In contrast, Plaintiff had no college credits, held no certifications above Fire Officer I and had served as a Lieutenant for three years.

The City contends that Plaintiff cannot establish a *prima facie* case of race discrimination pertaining to the 2006 promotion process because Plaintiff cannot show that he was as qualified or more qualified than the candidates who were promoted. Plaintiff did not respond directly to the City's argument that he was less qualified than those whites who were promoted to Captain in 2006. Plaintiff generally alleges that City decision-makers ignored the "equivalency requirement in the promotion process, changed the requirement of years in rank, and changed the requirement of certification adversely affecting Plaintiff." (Docket Entry No. 65, Response at 35-36.) Plaintiff has made no showing that the City included and then ignored an experience equivalency requirement in the job posting for Captain in August 2005. As for the requirement of years in rank, Plaintiff had three years in rank as a Lieutenant, which is all that the job posting required. However, other more qualified white (and black) candidates had the same or greater numbers of years

in rank. Plaintiff has not produced any facts to show how the City's alleged practice of changing the number of years required for certain promotions had any affect on him with regard to the Captain promotion in 2005-2006. As to certifications, Plaintiff had the minimum required certification of Fire Officer I when he applied for Captain. Other more qualified candidates (both white and black), however, possessed more certifications than Plaintiff obtained during his career. Thus, the Court concludes that Plaintiff has not produced evidence sufficient for a *prima facie* case to show that he was as qualified or better qualified than other candidates for promotion to Captain in 2006. *See Laderach*, 207 F.3d at 828; *Anthony v. BTR Automotive Sealing Sys., Inc.*, 339 F.3d 506, 515 (6th Cir. 2003). The City is entitled to summary judgment on this claim. Accordingly, none of the claims brought by Michael Jones survives the City's summary judgment motion.

3. Stephen Gibson

a. Engineer promotion - 1994

Plaintiff applied for the position of Engineer in 1994, but of thirteen candidates, he ranked last. He alleges he was denied promotion because of his race.

The Court does not have subject matter jurisdiction to hear this claim because Plaintiff did not file a timely EEOC charge challenging the denial of promotion within 300 days after the denial occurred. *See Strouss*, 250 F.3d at 342. The claim is also time-barred under the THRA because Gibson did not file suit within one year. *See* Tenn. Code Ann. § 4-21-311(d). For the reasons stated above, Gibson cannot rely on the

continuing violation theory to save this claim. *See Austion*, 244 Fed.Appx. at 647-648. The City is entitled to summary judgment on the claim.

b. Lieutenant promotion - 2005

The City announced one or more open positions for Lieutenant on November 28, 2005. The eligibility requirements included a high school diploma or GED with an Associate's Degree in Fire Science preferred. The job also required National or State of Tennessee certification as a Fire Apparatus Operator, Fire Officer I and Firefighter II. The selection process included an assessment center, evaluation of education and training, and a Chief's interview.

Gibson wanted to apply for the position, but he looked at the criteria and realized that he did not qualify. (Docket Entry No. 45, Gibson Depo. at 14.) Gibson talked to Chief Garzarek about the position. The Chief told him that he would be wasting his time to apply. (*Id.*) Gibson did not apply.

Gibson alleged that he was treated differently because of his race because a white firefighter, Jerrol Coats, was allowed to take the certification courses after the promotion process began and he was promoted. According to Gibson, however, Coats' promotion to Lieutenant occurred in 1998. (Gibson Depo. at 57.)

The City contends that Gibson cannot establish a *prima facie* case of race discrimination pertaining to the 2005 promotion because he cannot show that he was as qualified or more qualified than the candidates who were promoted. Gibson did not respond directly to

the City's argument that he was less qualified than those whites who were promoted to Lieutenant in 2005. In his brief, Gibson wrote only that "Plaintiff has stated claims of discrimination based on his failure to be promoted in 2002 and 2006." (Docket Entry No. 64, Response at 35.) This statement must pertain to another co-plaintiff because Gibson does not allege that he was denied promotion in 2002 and 2006.

Gibson's claim fails because he did not apply for the position. Moreover, Gibson has not shown that any white firefighter who was promoted to Lieutenant in 2005 was treated differently or better than he was treated. Even if Coats were a relevant comparator, Coats was in the process of obtaining his Fire Officer I certification during his promotion process, and he obtained the certification before he was promoted. (Darryl Jones Depo. at 138-139.[4]) Gibson, on the other hand, had not registered to take the exam for the certification.

Caucasian engineers Ben Marler and Greg Wild were promoted to Lieutenant in March 2006. They were ranked first and second on the promotion certification list and they had greater qualifications than Gibson, including Fire Officer I certifications. Marler was certified as an Apparatus Operator, Firefighter II, Fire Instructor I and Safety Officer. He completed three years of college education at Auburn University and two years in fire science at a community college. Wild served as Lieutenant,

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[4] Jones testified that Coats was promoted to Lieutenant in 2001. It is not clear to the Court what year Coats received the promotion.

Captain and Battalion Chief in New York. He was certified as an Apparatus Operator, Firefighter I and II, Safety Officer I and Fire Instructor I. At the time of his deposition on March 20, 2007, Gibson was working toward his Associate's Degree in Fire Science. (Gibson Depo. at 8-9.) Thus, the white firefighters who were promoted to Lieutenant in 2005 were more qualified than Gibson.

The Court concludes that Plaintiff has not produced evidence sufficient for a *prima facie* case to show that he applied for the position and that he was as qualified or better qualified than white firefighters who were promoted to Lieutenant in 2005. *See Laderach*, 207 F.3d at 828; *Anthony*, 339 F.3d at 515. The City is entitled to summary judgment on this claim. Accordingly, neither of the claims brought by Gibson survives the City's summary judgment motion.

4. Anthony Pasley

a. Captain promotion - 2002

Pasley applied for promotion to Captain in 2002, but he did not receive the promotion. He claims that white firefighters who were less qualified and had less seniority were promoted over him. The Court does not have subject matter jurisdiction to hear this claim because Pasley did not file a timely EEOC charge challenging the denial of promotion within 300 days after the denial occurred. *See Strouss*, 250 F.3d at 342. The claim is also time-barred under the THRA because Pasley did not file suit within one year. *See* Tenn. Code Ann. § 4-21-311(d). For the reasons stated earlier, Pasley cannot rely on the continuing violation theory to save this claim. *See Austion*, 244 Fed.Appx. at 647-

648. The City is entitled to summary judgment on the claim.

b. Captain promotion - 2005

Pasley applied for promotion to Captain in 2005. On March 9, 2006, the City promoted eleven candidates to Captain, one of whom was African American. On October 9, 2006, Pasley and David Kolak were promoted to Captain. Pasley alleges that he was promoted because he filed this lawsuit and the City was trying to correct a wrong.

The City contends that Pasley did not suffer a materially adverse employment action because he was promoted to Captain. The City also contends that not getting promoted for a period of seven months does not constitute a materially adverse employment action, but even if it does, Pasley failed to produce any evidence that the delay in his promotion to Captain was due to his race.

Pasley did not respond specifically to the City's arguments. Rather, Pasley stated in his brief: "Plaintiff has stated claims for discrimination based on his failure to be promoted in 2002 and 2006." (Docket Entry No. 66, Response at 36.) This is not sufficient to show that Pasley has generated a genuine issue of material fact for trial.

Giving Pasley the benefit of the doubt that delay in a promotion is a materially adverse employment action because it affects pay, title, and job responsibilities, the Court concludes that Pasley's discrimination claim still must fail. The City produced a legitimate, non-discriminatory reason for its delay in promoting

Pasley. The City's evidence shows that Pasley ranked 14th out of 19 candidates on the Captain certification list as of February 2006. (Docket Entry No. 121, Ex. L at 1.) Thirteen positions were filled from the list initially, and those promoted, including at least one African American, were better qualified than Pasley. (*Id.*) When two Captain positions opened later in 2006, Pasley was promoted. Pasley has not produced any evidence that the City's reason for waiting until late 2006 to promote him to Captain was a pretext for racial discrimination. *See Laderach*, 207 F.3d at 828 (noting that, to show pretext, plaintiff must prove the employer's asserted reason had no basis in fact, the reason did not in fact motivate the adverse employment action, or the reason was insufficient to motivate the adverse employment action). Plaintiff's mere personal beliefs, conjecture and speculation that race played a role are insufficient to support an inference of race discrimination. *See Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 268 (6th Cir. 1986). Thus, the City is entitled to summary judgment on this claim.

c. Administrative Captain - 2006

Pasley alleges that when a white Administrative Captain was transferred from that position to shift Captain, he inquired about the Administrative Captain position and was told he was not qualified for it. The Administrative Captain position was filled by Joe Polenzani, who was already a Captain. At the time, Pasley had not been promoted to Captain. Pasley admitted that the move was lateral and that only those at the rank of Captain could apply for the position. (Docket Entry No. 49-1, Pasley Depo. at 61.)

Pasley cannot establish a *prima facie* case of discrimination because he admits he was not qualified for the Administrative Captain position. *See Laderach*, 207 F.3d at 828; *Anthony*, 339 F.3d at 515. The City is entitled to summary judgment on this claim. Accordingly, none of the claims brought by Pasley survives the City's summary judgment motion.

III. CONCLUSION

For all of the reasons stated, Defendant's Motion For Summary Judgment As To Plaintiff Darryl Jones (Docket Entry No. 24), Motion For Summary Judgment As To Plaintiff Michael Jones (Docket Entry No. 35), Motion For Summary Judgment As To Plaintiff Stephen Gibson (Docket Entry No. 46), and Motion For Summary Judgment As To Plaintiff Anthony Pasley (Docket Entry No. 54), will be granted in their entirety. All of Plaintiffs' claims will be dismissed with prejudice.

An appropriate Order shall be entered.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Nos. 3:06-0807; 3:06-0808;
3:06-0809; 3:06-0810

[Filed January 23, 2008]

DARRYL JONES, ET AL.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF FRANKLIN,	)
	)
Defendant.	)
	)

ORDER

JUDGE ECHOLS

For the reasons explained in the Memorandum entered contemporaneously herewith, the Court rules as follows:

(1) Defendant's Motion For Summary Judgment As To Plaintiff Darryl Jones (Docket Entry No. 24) is hereby GRANTED.

(2) Defendant's Motion For Summary Judgment As To Plaintiff Michael Jones (Docket Entry No. 35) is hereby GRANTED.

(3) Defendant's Motion For Summary Judgment As To Plaintiff Stephen Gibson (Docket Entry No. 46) is hereby GRANTED.

(4) Defendant's Motion For Summary Judgment As To Plaintiff Anthony Pasley (Docket Entry No. 54) is hereby GRANTED.

These cases are hereby DISMISSED WITH PREJUDICE.

Entry of this Order on the docket shall constitute entry of final Judgment in accordance with Federal Rules of Civil Procedure 58 and 79(a).

IT IS SO ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-5180

[Filed June 1, 2009]

DARRYL JONES, MICHAEL JONES, ANTHONY PASLEY, and STEPHEN GIBSON,

Plaintiffs-Appellants,

v.

CITY OF FRANKLIN,

Defendant-Appellee.

ORDER

BEFORE: KENNEDY, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk